

FRANK M. MANGAN

California State Bar No. 57689

FEDERAL DEFENDERS OF SAN DIEGO, INC.

225 Broadway, Suite 900

San Diego, California 92101-5030

Telephone: (619) 234-8467

Facsimile: (619) 687-2666

Email: Frank_Mangan@fd.org

Attorneys for Mr. Alarid

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

(HONORABLE JANIS L. SAMMARTINO)

UNITED STATES OF AMERICA,

Plaintiff,

v.

LUIS FRANCISCO ALARID,

Defendant.

CASE NO. 08CR1797-JLS

DATE: June 27, 2008

TIME: 1:30 p.m.

NOTICE OF MOTIONS AND MOTIONS:

- (1) TO COMPEL DISCOVERY/
PRESERVE EVIDENCE; AND
- (2) TO GRANT LEAVE TO FILE
FURTHER MOTIONS.

TO: KAREN P. HEWITT, UNITED STATES ATTORNEY, AND
PETER KO, ASSISTANT UNITED STATES ATTORNEY; AND
GREGORY W. STAPLES, ASSISTANT UNITED STATES ATTORNEY:

PLEASE TAKE NOTICE that on June 27, 2007, at 1:30 p.m. or as soon thereafter as counsel may be heard, the defendant, Luis Francisco Alarid, by and through his counsel, Frank M. Mangan and Federal Defenders of San Diego, Inc., will ask this Court to enter an order granting the following motions.

MOTIONS

The defendant, Luis Francisco Alarid, by and through his attorneys, Frank M. Mangan and Federal Defenders of San Diego, Inc., pursuant to the United States Constitution, the Federal Rules of Criminal Procedure, and all other applicable statutes, case law and local rules, hereby moves this Court for an order:

- 1) to compel discovery/preserve evidence; and
- 2) for leave to file further motions.

These motions are based upon the instant motions and notice of motions, the attached statement of facts and memorandum of points and authorities, and all other materials that may come to this Court's attention at the time of the hearing on these motions.

Respectfully submitted,

Dated: June 5, 2008

/s/ Frank M. Mangan
FRANK M. MANGAN
Federal Defenders of San Diego, Inc.
Attorneys for Mr. Alarid

FRANK M. MANGAN

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) STATEMENT OF FACTS AND
) MEMORANDUM OF POINTS AND
) AUTHORITIES IN SUPPORT OF
) DEFENDANT'S MOTIONS.

I.

STATEMENT OF FACTS¹

Beginning on or about February 14, 2008 and continuing until about May 16, 2008 Mr. Alarid's activities at the Otay Mesa Port of Entry were surveilled and, at times, videotaped. It is alleged that Mr. Alarid permitted vehicles to enter the United states on February 14th 2008, March 6th 2008, March 13th 2008 and May 3rd, 2008 without proper inspection. It is further alleged that the vehicles admitted on the above dates contained undocumented persons and sometimes marijuana as well as undocumented persons. At times these vehicles were followed to their immediate destinations and at times the vehicles' drivers were arrested and the contents of the vehicles were seized. It is also alleged that Mr. Alarid received

¹Most of this statement of facts is based on information provided by the government. Mr. Alarid does not admit its accuracy and reserves the right to challenge it at a later time.

1 payments of at least \$200,000.00 for his permitting entry of vehicles without proper inspection. Mr. Alarid
 2 was arrested on May 16, 2008 and has been in custody, detained without bail, since that date.

3 4 II.

5 MOTION TO COMPEL DISCOVERY/PRESERVE EVIDENCE

6 At this time Mr. Alarid has not received any discovery and requests the following discovery
 7 materials be provided by the United States Attorneys offices for the Southern and Central Districts of
 8 California and the United States Attorney General's office. His request is not limited to those items that the
 9 prosecutor knows of. It includes all discovery listed below that is in the custody, control, care, or
 10 knowledge of any "closely related investigative [or other] agencies." See United States v. Bryan, 868 F.2d
 11 1032 (9th Cir. 1989); United States v. Jernigan, No. 05-10086, at *6 (9th Cir. July 9, 2007) (en banc).

12 1. The Defendant's Statements. The government must disclose to the defendant copies of any
 13 written or recorded statements made by the defendant; the substance of any statements made by the
 14 defendant that the government intends to offer in evidence at trial; any response by the defendant to
 15 interrogation; the substance of any oral statements that the government intends to introduce at trial and any
 16 written summaries of the defendant's oral statements contained in the handwritten notes of the government
 17 agent; any response to any Miranda warnings that may have been given to the defendant; and any other
 18 statements by the defendant. FED. R. CRIM. P. 16(a)(1)(A) and (B). The Advisory Committee Notes and
 19 the 1991 amendments to Rule 16 make clear that the government must reveal *all* the defendant's statements,
 20 whether oral or written, regardless of whether the government intends to make any use of those statements.

21 2. Arrest Reports, Notes and Dispatch Tapes. The defendant also specifically requests that
 22 all arrest reports, notes and dispatch or any other tapes that relate to the circumstances surrounding his arrest
 23 or any questioning, if such reports have not already been produced *in their entirety*, be turned over to him.
 24 This request includes, but is not limited to, any rough notes, records, reports, transcripts or other documents
 25 in which statements of the defendant or any other discoverable material is contained. The defendant
 26 includes in this request any redacted portions of any report of the investigation and any subsequent reports
 27 that the case agent or any other agent has written. This is all discoverable under FED. R. CRIM. P.
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1 16(a)(1)(A) and (B) and Brady v. Maryland, 373 U.S. 83 (1963). See also Loux v. United States, 389 F.2d
 2 911 (9th Cir. 1968). Arrest reports, investigator's notes, memos from arresting officers, dispatch tapes,
 3 sworn statements, and prosecution reports pertaining to the defendant are available under FED. R. CRIM. P.
 4 16(a)(1)(A) and (B), FED. R. CRIM. P. 26.2 and 12(I). Preservation of rough notes is requested, whether or
 5 not the government deems them discoverable.

6 3. Brady Material. The defendant requests all documents, statements, agents' reports, and
 7 tangible evidence favorable to him on the issue of guilt and/or that affects the credibility of the
 8 government's case. Impeachment and exculpatory evidence both fall within Brady's definition of evidence
 9 favorable to the accused. United States v. Bagley, 473 U.S. 667 (1985); United States v. Agurs, 427 U.S.
 10 97 (1976).

11 4. Any Information That May Result in a Lower Sentence. Any information that may result
 12 in a more favorable sentence must also be disclosed pursuant to Brady, 373 U.S. 83. The government must
 13 disclose any cooperation or attempted cooperation by the defendant, as well as any information that could
 14 affect any base offense level or specific offense characteristic under Chapter Two of the United States
 15 Sentencing Commission Guidelines Manual ("Guidelines"). Also included in this request is any information
 16 relevant to a Chapter Three adjustment, a determination of the defendant's criminal history, or any other
 17 application of the Guidelines.

18 5. The Defendant's Prior Record. Evidence of a prior record is available under FED. R. CRIM.
 19 P. 16(a)(1)(D). The defendant specifically requests a complete copy of any criminal record.

20 6. Any Proposed 404(b) Evidence. Evidence of prior similar acts is discoverable under FED.
 21 R. CRIM. P. 16(a)(1)(D) and FED. R. EVID. 404(b) and 609. In addition, under FED. R. EVID. 404(b), "upon
 22 request of the accused, the prosecution . . . shall provide reasonable notice in advance of trial . . . of the
 23 general nature" of any evidence the government proposes to introduce under FED. R. EVID. 404(b) at
 24 trial. Sufficient notice requires the government to "articulate *precisely* the evidential hypothesis by which
 25 a fact of consequence may be inferred from the other acts evidence." United States v. Mehrmanesh, 689
 26 F.2d 822, 830 (9th Cir. 1982) (emphasis added; internal citations omitted); see also United States v. Brooke,
 27 4 F.3d 1480, 1483 (9th Cir. 1993) (reaffirming Mehrmanesh and reversing convictions).
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1 The defendant requests that such notice be given *three weeks before trial* to give the defense
2 time to adequately investigate and prepare for trial.

3 7. Evidence Seized. Evidence seized at each crime scene and evidence seized as a result of
4 any search, either warrantless or with a warrant, is discoverable under FED. R. CRIM. P. 16(a)(1)(E) and the
5 Defendant requests such material. The Defendant also requests copies of all search warrants, their affidavits
6 and their returns.

7 8. Request for Preservation of Evidence. The defense specifically requests that all dispatch
8 tapes, surveillance film and/or pictures, lifted latent fingerprints or any other physical evidence that may
9 be destroyed, lost, or otherwise put out of the possession, custody, or care of the government and that relate
10 to the arrest or the events leading to the arrest in this case be preserved. This request includes, but is not
11 limited to any vehicle involved in the case, the defendant's personal effects, and any evidence seized from
12 the defendant or any third party. This request also includes any material or percipient witnesses who might
13 be deported or otherwise likely to become unavailable (e.g., undocumented aliens and transients). The
14 Defendant also requests the name, address and telephone numbers of any attorneys appointed to represent
15 material witnesses in this case.

16 It is requested that the prosecutor be ordered to *question* all the agencies and individuals
17 involved in the prosecution and investigation of this case to determine if such evidence exists, and if it does
18 exist, to inform those parties to preserve any such evidence.

19 9. Henthorn Material. The defendant requests that the Assistant United States Attorney
20 ("AUSA") assigned to this case oversee (not personally conduct) a review of all personnel files of each
21 agent involved in the present case for impeachment material. See Kyles v. Whitley, 514 U.S. 419, 437-38
22 (1995) (holding that "the individual prosecutor has a duty to learn of any favorable evidence known to the
23 others acting on the government's behalf in the case, including the police"); United States v. Henthorn, 931
24 F.2d 29 (9th Cir. 1991). This request includes, but is not limited to, any complaints filed (by a member of
25 the public, by another agent, or any other person) against the agent, whether or not the investigating
26 authority has taken any action, as well as any matter for which a disciplinary review was undertaken,
27 whether or not any disciplinary action was ultimately recommended. The defendant further requests
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1 production of any such information at least one week prior to the motion hearing and two weeks prior to
2 trial. If the prosecutor is uncertain whether certain information should be disclosed pursuant to this request,
3 this information should be produced to the Court in advance of the motion hearing and the trial for an *in*
4 *camera* inspection.

5 10. Tangible Objects. The defendant requests the opportunity to inspect, copy, and test, as
6 necessary, all other documents and tangible objects, including photographs, film, books, papers, documents,
7 alleged narcotics, fingerprint analyses, vehicles, or copies of portions thereof, that are material to the
8 defense or intended for use in the government's case-in-chief or were obtained from or belong to the
9 defendant. FED. R. CRIM. P. 16(a)(1)(E). Specifically, the defendant requests color copies of all
10 photographs in the government's possession that relate to this case and copies of all surveillance tapes or
11 DVDs in the possession of the government relating to this case.

12 11. Expert Witnesses. The defendant requests the name, qualifications, and a written
13 summary of the testimony of any person that the government intends to call as an expert witness during its
14 case in chief. FED. R. CRIM. P. 16(a)(1)(G). This summary should include a description of the witness'
15 opinion(s), as well as the bases and the reasons for the opinion(s). See United States v. Duvall, 272 F.3d
16 825 (7th Cir. 2001) (finding that government's written expert notice did not adequately summarize or
17 describe police detective's testimony in drug prosecution where notice provided only a list of the general
18 subject matters to be covered and failed to identify what opinion the expert would offer on those subjects).
19 This request includes, but is not limited to, disclosure of the qualifications of any government witness who
20 will testify that he understands and/or speaks Spanish or any other foreign language that may have been used
21 during the course of an interview with the defendant or any other witness.

22 The defendant requests the notice of expert testimony be provided at a minimum of *three*
23 *weeks prior to trial* so that the defense can properly prepare to address and respond to this testimony,
24 including obtaining its own expert and/or investigating the opinions, credentials of the government's expert
25 and obtain a hearing in advance of trial to determine the admissibility of qualifications of any expert. See
26 Kumho Tire Co., Ltd. v. Carmichael, 526 U.S. 137, 119 S. Ct. 1167, 1176 (1999) (trial judge is "gatekeeper")
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1 and must determine, reliability and relevancy of expert testimony and such determinations may require
2 “special briefing or other proceedings”).

3 12. Impeachment evidence. The defendant requests any evidence that any prospective
4 government witness has engaged in any criminal act whether or not resulting in a conviction and whether
5 any witness has made a statement favorable to the defendant. See FED. R. EVID. 608, 609 and 613. Such
6 evidence is discoverable under Brady, 373 U.S. 83. See United States v. Strifler, 851 F.2d 1197 (9th Cir.
7 1988) (witness’ prior record); Thomas v. United States, 343 F.2d 49 (9th Cir. 1965) (evidence that detracts
8 from a witness’ credibility).

9 13. Evidence of Criminal Investigation of Any Government Witness. The defendant requests
10 any evidence that any prospective witness is under investigation by federal, state or local authorities for any
11 criminal conduct. United States v. Chitty, 760 F.2d 425 (2d Cir. 1985).

12 14. Evidence of Bias or Motive to Lie. The defendant requests any evidence that any
13 prospective government witness is biased or prejudiced against the defendant, or has a motive to falsify or
14 distort his or her testimony. Pennsylvania v. Ritchie, 480 U.S. 39 (1987); Strifler, 851 F.2d 1197.

15 15. Evidence Affecting Perception, Recollection, Ability to Communicate, or Veracity. the
16 defendant requests any evidence, including any medical or psychiatric report or evaluation, tending to show
17 that any prospective witness’s ability to perceive, remember, communicate, or tell the truth is impaired; and
18 any evidence that a witness has ever used narcotics or other controlled substance, or has ever been an
19 alcoholic. Strifler, 851 F.2d 1197; Chavis v. North Carolina, 637 F.2d 213, 224 (4th Cir. 1980).

20 16. Witness Addresses. The defendant requests the name and last known address of each
21 prospective government witness. See United States v. Napue, 834 F.2d 1311 (7th Cir. 1987); United States
22 v. Tucker, 716 F.2d 576 (9th Cir. 1983) (failure to interview government witnesses by counsel is
23 ineffective); United States v. Cook, 608 F.2d 1175, 1181 (9th Cir. 1979) (defense has equal right to talk to
24 witnesses). The defendant also requests the name and last known address of every witness to the crime or
25 crimes charged (or any of the overt acts committed in furtherance thereof) who will not be called as a
26 government witness. United States v. Cadet, 727 F.2d 1453 (9th Cir. 1984).

1 17. Name of Witnesses Favorable to the Defendant. The defendant requests the name of any
2 witness who made any arguably favorable statement concerning the defendant or who could not identify him
3 or identified someone else or who was unsure of his identity or participation in the crime charged. Jackson
4 v. Wainwright, 390 F.2d 288 (5th Cir. 1968); Chavis, 637 F.2d at 223; Jones v. Jago, 575 F.2d 1164, 1168
5 (6th Cir. 1978); Hudson v. Blackburn, 601 F.2d 785 (5th Cir. 1979), cert. denied, 444 U.S. 1086 (1980).

6 18. Statements Relevant to the Defense. The defendant requests disclosure of any statement
7 that may be “relevant to any possible defense or contention” that he might assert. United States v.
8 Bailleaux, 685 F.2d 1105 (9th Cir. 1982). This includes grand jury transcripts that are relevant to the
9 defense motion to dismiss the indictment.

10 19. Jencks Act Material. The defendant requests production in advance of the motion hearing
11 or trial of all material, including dispatch tapes, that the government must produce pursuant to the Jencks
12 Act, 18 U.S.C. § 3500 and FED. R. CRIM. P. 26.2. A verbal acknowledgment that “rough” notes constitute
13 an accurate account of the witness’ interview is sufficient for the report or notes to qualify as a statement
14 under section 3500(e)(1). Campbell v. United States, 373 U.S. 487, 490-92 (1963); see also United States
15 v. Boshell, 952 F.2d 1101 (9th Cir. 1991) (holding that interview notes constitutes Jencks material when
16 an agent reviews notes with the subject of the interview); see also United States v. Riley, 189 F.3d 802, 806-
17 08 (9th Cir. 1999). Advance production will avoid the possibility of delay of the motion hearing or trial to
18 allow the defendant to investigate the Jencks material. The defendant requests pre-trial disclosure of such
19 statements to avoid unnecessary recesses and delays and to allow defense counsel to prepare for, and use
20 properly any Jencks statements during cross-examination.

21 20. Giglio Information. Pursuant to Giglio v. United States, 405 U.S. 150 (1972), the
22 defendant requests all statements and/or promises, expressed or implied, made to any government witnesses,
23 in exchange for their testimony in this case, and all other information that could arguably be used for the
24 impeachment of any government witnesses.

25 21. Agreements Between the Government and Witnesses. The defendant requests discovery
26 regarding any express or implicit promise, understanding, offer of immunity, of past, present, or future
27 compensation, or any other kind of agreement or understanding, including any implicit understanding
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1 relating to criminal or civil income tax, forfeiture or fine liability, between any prospective government
2 witness and the government (federal, state and/or local). This request also includes any discussion with a
3 potential witness about or advice concerning any immigration benefits, any contemplated prosecution, or
4 any possible plea bargain, even if no bargain was made or the advice not followed.

5 22. Informants and Cooperating Witnesses. The defendant requests disclosure of the names
6 and addresses of all informants or cooperating witnesses used or to be used in this case, and in particular,
7 disclosure of any informant who was a percipient witness in this case or otherwise participated in the crime
8 charged against the defendant. The government must disclose the informant's identity and location, as well
9 as disclose the existence of any other percipient witness unknown or unknowable to the defense. Roviaro
10 v. United States, 353 U.S. 53, 61-62 (1957). The government must disclose any information derived from
11 informants that exculpates or tends to exculpate the defendant.

12 23. Reports of Scientific Tests or Examinations. Pursuant to FED. R. CRIM. P. 16(a)(1)(F),
13 the defendant requests the reports of all tests and examinations conducted upon the evidence in this case,
14 including, but not limited to, any fingerprint testing done upon any evidence seized in this case, that is
15 within the possession, custody, or control of the government, the existence of which is known, or by the
16 exercise of due diligence may become known, to the attorney for the government, and that are material to
17 the preparation of the defense or are intended for use by the government as evidence in chief at the trial.

18 24. Residual Request. The defendant intends by this discovery motion to invoke his rights
19 to discovery to the fullest extent possible under the Federal Rules of Criminal Procedure and the
20 Constitution and laws of the United States.

21 22 III.

23 LEAVE TO FILE FURTHER MOTIONS

24 At this time Mr. Alarid has not received any pages of discovery. As new information
25 surfaces – via discovery provided by government, defense investigation, or an order of this court – the
26 defense may need to file further motions, or to supplement existing motions. For this reason, defense
27 counsel requests leave to file further motions, including a motion to dismiss the Indictment because of
28

erroneous instructions given to the July, 2007 grand jury that returned the subject indictment against the defendant.

IV.

CONCLUSION

For the reasons stated, Mr. Alarid requests that this Court grant his motions.

Respectfully Submitted,

Dated: June 5, 2008

/s/ Frank M. Mangan

FRANK M. MANGAN

Federal Defenders of San Diego, Inc.
Attorneys for Mr. Alarid

CERTIFICATE OF SERVICE

Counsel for Defendant certifies that the foregoing pleading is true and accurate to the best of his information and belief, and that a copy of the foregoing document has been served this day upon:

PETER KO

Peter.Ko@usdoj.gov

U S Attorney CR

Efile.dkt.gc2@usdoj.gov

Gregory W. Staples

Assistant United States Attorney via email

411 West Fourth Street

Santa Ana, California 92701

Dated: June 5, 2008

/s/ Frank M. Mangan

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